EASTERN & ORIENTAL HOTEL [1951] SDN. BHD.

v.

NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS & ANOR.

HIGH COURT MALAYA, PULAU PINANG
MOHAMED DZAIDDIN J
[ORIGINATING MOTION NO. 25-30 OF 1990]
13 MAY 1991

ADMINISTRATIVE LAW: *Application for certiorari - Whether jurisdictional defect and error of law on the record - Whether the learned President erred in his deliberation on the items disputed - Whether within court's jurisdiction to consider them.*

ADMINISTRATIVE LAW: *Judicial review - Whether in the consideration of the present application - The exercise of discretion for factual error can be examined by the court - Whether exercise of properly, not improperly or mistakenly - Whether under the influence of misdirection in fact and in law - Sections 30(4), (5), (6), 31, 56 of the Industrial Relations Act 1967.*

In this application for *certiorari* the applicant sought to remove into the Court for the purpose of being quashed the award of the Industrial Court dated 16 April 1990 on the ground of jurisdictional defect and an error of law on the record.

The facts of the case are quite straightforward. There was a trade dispute which had been referred to the Court under s. 26(2) of the Industrial Relations Act 1967 (the Act).

On 16 April 1990, the Industrial Court handed down the award on wages, terms and conditions of employment binding the applicant and their employees who are members of the first respondent.

Inter alia, the gist of Counsel's argument was that the learned President had erroneously misconstrued the six items and thus failed to deal with them item by item. This was further contended as jurisdictional defect.

Secondly, it was submitted that the learned President had allowed the items on salary scale and increment because he had misconstrued the full import of the meaning of "depreciation" and fell into error by adding the depreciated sum to the profit of the hotel thereby enhancing its profit.

This was cited as an error of law and fact amounting to jurisdictional defect.

Held:

[1] For the consideration of the present application, it is also important to bear in mind what was stated regarding the exercise of discretion for factual error in *Laker Airways Ltd.* that the Courts can examine the exercise of (discretionary) power to see that they are used properly, and not improperly or mistakenly.

[2] By "mistakenly" the learned Judge meant under the influence of misdirection in fact and in law, in addition, when examining the facts and circumstances of this case, the learned Judge stated the need to his mind to ss. 30(4), (5), (6), 31 and 56 of the Act.

[3] After perusing the notes of proceedings, it is, clear to the Court that the said six items, which the applicant had contended were never agreed had been deliberated and adjudicated together with the remaining items mentioned under para. 4 of the award. The notes contained

detailed record of deliberations on monetary items, including the six disputed articles. Taken as a whole, it is my finding that in fact and in substance, the Court had adjudicated on the six disputed items, although the award stated that these items had been agreed as consent items.

[4] With respect to the award, it is the opinion of this Court that it contained all the points which were in issue which were dealt with throughout the proceedings. The findings of the Court on each items are supported by reasons. Bearing in mind the powers of the Court in relation to a trade dispute, this Court thinks that it is not proper to disturb its findings.

[5] In the light of the principles of law discussed above, the learned Judge found no serious errors in the award either on fact or law as amounting to a jurisdictional defect.

[6] Further, given the fact that the granting of this order is discretionary and bearing in mind the conduct of the applicant with regard to its failure to comply with the terms of the award necessitating the filing of an action under s. 56 of the Act, and the learned Judge took the view that, the present case does not warrant the granting of the writ of *certiorari*.

[Application dismissed with costs.]

Cases referred to:

National Union of Petroleum & Chemical Industry Workers v. Amalgamated Properties & Industries Bhd. [1989] 1 MLJ 39 ***(cons)***

Terengganu Bus Sdn. Bhd. v. Transport Workers Union [1983] 1 MLJ 393 ***(cit)***

Malayan Banking Bhd. v. Association of Bank Officers Peninsular Malaysia and Industrial Court [1988] 1 CLJ (Rep) 183 ***(cons)***

Laker Airways Ltd. v. Department of Trade [1977] 1 QB 643 ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, ss. 26(2), 30(4), (5), (6), 31, 56

For the applicant - Chin Yew Meng; M/s. Allen & Gledhill
For the respondent - B. Lobo; M/s. Lobo & Associates

JUDGMENT

Mohamed Dzaiddin J:

In this application for *certiorari*, the applicant sought to remove into this Court for the purpose of being quashed the award of the Industrial Court dated 16 April 1990 on the ground of jurisdictional defect and an error of law on the record.

The facts of the case are quite straightforward. There was a trade dispute which had been referred to the Court under s. 26(2) of the Industrial Relations Act 1967 (the Act). The Court commenced hearing on 14 April 1988 and after several adjournments, the proceedings finally ended on 31 March 1989. On 16 April 1990, the Industrial Court handed down the award on wages, terms and conditions of employment binding the applicant and their employees, who are members of the 1st respondent. The award stated that the parties agreed to accept the union's statement of case as the working basis of a new award for three years effective from 1 January 1984. There were 33 articles in the proposed agreement. Seventeen articles were fully agreed, leaving fifteen articles including "implementation" in dispute. The award further stated that in the course of the proceedings both parties agreed to eight of the fifteen articles, thus leaving the following articles to be adjudicated by the Court:

(1) Retrenchment/Redundancy;
(2) Festival Cash Advance;
(3) Split Duty Allowance;
(4) Check off;
(5) Salary Scale & Annual Increment;
(6) Overnight Duty Allowance; and
(7) Implementation.

The above articles were considered and adjudicated whilst the agreed articles were incorporated into the award as consent articles.

Now, it is the applicant's case that the following articles were never agreed by the Hotel:

(1) Bonus (Article 25);
(2) Service Charge (Article 24);
(3) Overtime (Article 9);
(4) Rates of Pay for Weekly Rest Day and Public Holidays (Article 10(b), (11b) and (c));
(5) Uniform Laundry and Shoes (Article l7b);
(6) Retirement (Article 20 (a) second sentence);

Secondly, it is the applicant's case that the Industrial Court committed an error of law on the record when it deliberated and adjudicated on the issue of salary adjustment, increments and depreciation.

Encik Chin Yew Meng, for the applicant relied on his written notes of submission. But, the gist of Counsel's argument was that the learned President had erroneously misconstrued the six items by holding that they were agreed items and thus failed to deal with them item by item. Counsel contended that such a misconception of the situation had given rise to a jurisdictional defect. On the second ground, Counsel submitted that the President allowed the items on salary scale and increment because he had misconstrued the full import of the meaning of "depreciation" and fell into error by adding the depreciated sum to the profit of the Hotel and thereby enhanced its profit. According to Counsel, this was again an error of law and fact amounting to jurisdictional defect.

On the law, Encik Chin referred me to four cases mentioned in para. 12 of his notes of submission.

In reply, Encik Lobo submitted that based on the affidavit of Yeap Tong Guan (lampiran 17) the Court did not misconstrue the articles which were fully agreed and those which were disputed. Counsel contended that even if the learned President erred in his deliberation on the items which were disputed by the applicant, it was within the Court's jurisdiction to consider them unless its decision was clearly perverse. Counsel submitted that the Court had the jurisdiction to interpret the collective agreement either correctly or wrongly, relying on *National Union of Petroleum & Chemical Industry Workers v. Amalgamated Properties & Industries Bhd.* [1989] 1 MLJ 39 SC.

Encik Lobo further submitted that there was no jurisdictional defect in the award, but if there was, Counsel urged me to consider the conduct of the applicant after the award was handed down when exercising my discretion in the present application. According to Yeap Tong Guan, up to the hearing of this originating motion the applicant had not complied with all the provisions of the award. The 1st respondent had since filed a complaint under s. 56 of the Act which is pending disposal under I.C.C. No. 1/1-36/90. Counsel relied on the *dictum* of Hashim Yeop Abdullah Sani J (as he then was) in *Terengganu Bus Sdn. Bhd. v. Transport Workers Union* [1983] 1 MLJ 393.

When considering this originating motion, which is founded on jurisdictional error, there are a few legal principles which I have to take cognizance of. Aside from the authorities cited above by Encik Lobo, the first basic question I should ask myself is: What amounts to a jurisdictional defect? Tan Sri E. Abdoolcader SCJ had discussed this in *Malayan Banking Bhd. v. Association of Bank Officers Peninsular Malaysia and Industrial Court* [1988] 1 CLJ (Rep) 183. At p. 185, the learned Judge stated:

> I discussed and analysed at some length the question of what amounts to a jurisdictional defect in *Mak Sik Kwong (No. 2)* (at pp. 177-179) and in *Chan Siew Kim* when I said (at p. 146): The question of whether or not there is a manifest defect of jurisdiction will be one for consideration and determination on the particular circumstances of each case as it arises in the light of the principles discussed and postulated in my judgment in the case referred to [*Mak Sik Kwong (No. 2)*]. For a jurisdictional defect, it is not enough to establish error of law. It must be shown that the error goes to jurisdiction, power or validity.

For the consideration of the present application, it is also important to bear in mind what was stated by Lord Denning MR regarding the exercise of discretion for factual error in *Laker Airways Ltd. v. Department of Trade* [1977] 1 QB 643 that the Courts can examine the exercise of (discretionary) powers to see that they are used properly, and not improperly or mistakenly. By "mistakenly" I mean under the influence of misdirection in fact and in law. In addition, when examining the facts and circumstances of this case, I need to apply my mind to ss. 30(4), (5), (6), 31 and 56 of the Act.

It is now necessary to examine the notes of proceedings of the Industrial Court which commenced on 15 April 1988 to find out whether or not the President had wrongly accepted the six items as agreed items without evaluating them. The notes stated that the parties agreed to the list of items based on the statement of case. There are 17 articles in the list. Page 3 deals with the disputed articles - overtime, rest day and public holidays, uniforms and shoes. Page 4 deals with retirement (Article 20 (c) and (d) and retrenchment (Article 21). This is continued at pp. 5 and 6. The item on service charge (Article 24) was dealt with on pp. 6 and 7. On the issue of bonus (Article 25), the Court adjourned its deliberations to enable Encik Chin to lead oral evidence of Goh Joon Hai. However, the Court proceeded to consider the non-monetary items that is, check-off (Article 29) and implementation (Article 32). The following monetary items remained to be adjudicated at a later date:

1. Bonus (Article 25);
2. Split Duty Allowance (Article 26);
3. Salary (Article 27);
4. Overnight Duty Allowance (Article 28).

On 11 July 1988, the Court commenced hearing the evidence of Goh Joon Hai, the Hotel's auditor on the monetary items. Several days were spent on the examination, cross - examination and re-examination of this witness. Finally, on 30 September 1991 the Court after hearing submissions on bonus proceeded to adjudicate on the remaining monetary items stated above.

After perusing the notes of proceedings, it is clear to me that the above six items which the applicant contended were never agreed had been deliberated and adjudicated together with the remaining items mentioned under para. 4 of the award. The said award was wrong only for omitting to state in clear words that the six disputed items had also remained to be adjudicated. The Court treated the fifteen items under monetary and non-monetary, with those under monetary being adjudicated to later dates because the applicant had applied to lead oral evidence on the issue of bonus. In fact, the notes contained detailed record of

deliberations on monetary items, including the six disputed articles. Taken as a whole, it is my finding that in fact and in substance, the Court had adjudicated on the six disputed items, although the award stated that these items had been agreed as consent items.

With respect to the award, in my opinion, it contained all the points which were in issue which were dealt with throughout the proceedings. The finding of the Court on each items are supported by reasons. Bearing in mind the powers of the Court in relation to a trade dispute, I do not think it is proper for me to disturb its finding.

In the light of the principles of law discussed above, I find no serious errors in the award either on fact law as amounting to a jurisdictional defect. Further, given the fact that the granting of this order is discretionary and bearing in mind the conduct of the applicant with regard to its failure to comply with the terms of the award necessitating the filing of an action under s. 56 of the Act, in my judgment, the present case does not warrant the granting of the writ of *certiorari*. In the result, this application is dismissed with costs.

Also found at [1992] 2 CLJ 998